No. 2452

United States
Circuit Court of Appeals

For the Ninth Circuit.

CONTINENTAL & COMMERCIAL TRUST AND SAVINGS BANK, as Trustee,

Appellee,

vs.

PACIFIC COAST PIPE COMPANY, a Corporation,

Appellant,

and

KINGS HILL IRRIGATION & POWER COMPANY, ET AL.,

Defendants.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

MAYER, MEYER, AUSTRIAN & PLATT,
RICHARDS & HAGA,
Solicitors for Appellee, Continental and Commercial Trust & Savings Bank, Trustee.

N. M. RUICK,
Solicitor for Appellant, Pacific Coast Pipe Company.

SYMS-YORK CO PRINTERS & BINDERS, BOISE

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STATEMENT.

The Continental & Commercial Trust and Savings Bank (formerly the American Trust & Savings Bank), a corporation of the State of Illinois, as trustee, commenced an action in the District Court of the United States for the District of Idaho, Southern Division, against the Kings Hill Irrigation & Power Company, a corporation, Glenns Ferry Canal Company, Limited, a corporation, Pacific Coast Pipe Company, a corporation, and others, to foreclose a deed of trust or mortgage executed by

the principal defendant, Kings Hill Irrigation & Power Company, together with a certain amendment to said mortgage, which deed of trust or mortgage covered the property of the said Kings Hill Irrigation & Power Company known as the Kings Hill Irrigation works or system in Lincoln, Owyhee and Twin Falls Counties, in the State of Idaho.

The mortgage was executed November 2, 1908, and recorded December 9, 1908; the amendment thereto was executed March 1, 1909, and recorded on the 19th day of the same month.

Among other property covered by the mortgage were certain water right contracts entered into by the Irrigation Company with the settlers on the lands under the irrigation project, and shares of the capital stock of the Glenns Ferry Canal Company, Limited, representing the water rights so purchased, which contracts and shares of stock, it was alleged (Tr., pp. 25-41) had been assigned in writing and deposited with plaintiff by said Kings Hill Irrigation & Power Company, and were, at the time of said foreclosure, in the possession of the plaintiff.

This deed of trust or mortgage was given, and the contracts and shares of stock assigned, to secure an issue of bonds of the said Kings Hill Irrigation & Power Company to the amount of $500,000.00. (Tr., pp. 12, 13). The complaint alleged, and the Court found, that bonds to the face value of $358,-400.00 were actually executed, certified by the trus-

tee, and negotiated in accordance with the terms and provisions of the deed of trust. (Tr., p. 13).

It is alleged that the company had failed to pay the interest or principal of these bonds as the same fell due. (Tr., p. 41). Whereupon, plaintiff, as such trustee, in accordance with the terms of said mortgage, brought this action to foreclose. The prayer of the complaint (Tr., p. 47) was for judgment for such sum as should be found to be due and that the same be declared a lien upon the premises and that the property be ordered sold to satisfy the mortgage.

The interest of the Minneapolis Steel & Machinery Company is confined to a steel wagon bridge which it had constructed across Snake River, the dividing line between Owyhee and Elmore Counties, and on which the Kings Hill Siphon pipe line, crossing the river at that point, rests. The court found that this bridge was not covered by the mortgage nor subject to the lien of the Pacific Coast Pipe Company and as no error is predicated upon this decision, the Minneapolis Steel & Machinery Company has no interest in this appeal.

The principal contention was between appellant and appellee as to the priority of their respective liens and this was treated by the trial court as the controlling question in the case (Opinion of Court, Tr., p. 416, 418).

This question was raised at the trial (Tr., p. 148) upon the objection by counsel for the trustee to the

introduction of any evidence on the part of the cross-complainant, Pacific Coast Pipe Company, "for the reason that it appears by the statement of counsel and from the cross-complaint on file that the suit (to enforce the mechanic's lien) was not commenced within the time required by the lien laws of this state (Idaho) and particularly under the provisions of Sec. 5118, Revised Codes, which requires that the suit may be commenced within six months after the lien is filed and, in any event, within two years after the last material was furnished or the last service rendered." This objection was, by the Court, overruled *pro forma* without prejudice to its consideration upon the submission of the case. (Tr., p. 149). Thereupon, appellant introduced its evidence in support of the allegations of its cross-complaint. At the conclusion of the testimony offered by cross-complainant, counsel for the trustee renewed his objection to the evidence and moved the court (Tr., p. 163) "to strike out all the evidence and testimony and proof offered on behalf of cross-complainant for the reason that the cross-bill does not state a cause of action and it appears therefrom that the lien which cross-complainant seeks to foreclose had expired by its own limitation and under the statute before the cross-bill was filed and that the suit to foreclose the lien is barred by Section 5118, of the Codes of this state (Idaho). And it further appears that, when the lien was foreclosed as against the Kings Hill Irrigation & Power Company, the mortgage of the trustee, which the trustee

is now foreclosing, was of record and the trustee was not made a party to the suit."

This motion was denied by the court on the same conditions as the objection to the introduction of any testimony was overruled. (Tr., p. 149). Both the objection and motion to strike out were sustained by the court upon its final decision of the case (Tr., pp. 416-418) and the ruling of the court thereon is assigned as error. (Tr., p. 458, I and II).

During the progress of the case, numerous parties, including the State of Idaho, were permitted, by the court, to intervene for the purpose of protecting rights claimed by them, but the rights of none other than plaintiff, Continental & Commercial Trust & Savings Bank, Trustee, and the defendant and cross-complainant, Pacific Coast Pipe Company, are involved in this appeal.

The defendant, Pacific Coast Pipe Company, answered the complaint, denying, for want of knowledge, all the allegations contained in paragraphs 4 to 23, both inclusive, and paragraphs 25 to 30, both inclusive, of the complaint, and in answer to paragraph 24 of the complaint, Pacific Coast Pipe Company denied that its interest in the property described in the complaint is subordinate to the lien of the deed of trust or mortgage set out in the complaint or the indebtedness secured or sought to be secured thereby.

At the same time, the Pacific Coast Pipe Company filed its cross-complaint (Tr., p. 65) wherein it alleged:

That it was, during the times mentioned in the cross-complaint, a corporation organized under the laws of the State of Washington with its principal place of business at Seattle in said State; that, during the times mentioned in the cross-complaint, the Kings Hill Irrigation & Power Company, defendant, was the owner of a certain ditch, flume and canal known as the "Kings Hill Canal," and the right of way therefor located in Lincoln, Twin Falls, Owyhee and Elmore Counties, State of Idaho, together with all appurtenances, describing the property in detail.

That between the 13th day of July, 1909, and the 2nd day of July, 1910, cross-complainant, at the request of said Kings Hill I. & P. Co., and as an original contractor, furnished, sold and delivered to said Kings Hill Irrigation & Power Company at Ballard Station, Seattle, State of Washington, certain materials to be used and which were actually used in construction and repair of the ditch, flume and canal therein described; that the material so furnished was of the reasonable value of $12,363.24, payment to be made in cash, and, if not paid, interest to be charged after thirty days from date of invoice. The complaint contained an invoice of the materials with prices for the same and the credits to be given thereon, and alleged that there became due and owing from said Kings Hill I. & P. Co., to said Pacific Coast Pipe Co. on account of said materials, the sum of $10,071.33, together with interest thereon.

That cross-complainant ceased to furnish such materials on July 2, 1910, and, within ninety days thereafter and within the time allowed by the laws of the State of Idaho, filed for record in the proper counties its claim of lien, duly verified, which was recorded in Elmore County, August 4th, in Owyhee County, August 5, 1910. Copy of said notice of lien was attached to the cross-complaint as Exhibit A; that, thereafter, on October 31, 1910, and within the time allowed by the laws of the State of Idaho, cross-complainant commenced an action and proceeding in the District Court for Elmore County, being a proper court in which to institute such proceedings to enforce its said lien, and summons was duly issued thereon and served on the Kings Hill I. & P. Co., defendant named in said action, which, thereupon, appeared in said action and procured said cause to be removed into the United States Circuit Court for the District of Idaho, Southern Division; that said Kings Hill I. & P. Co. filed its answer in said cause and such proceedings were thereafter had in said United States Circuit Court that a decree of said court was duly entered on the 30th day of December, 1911, by which it was ordered, adjudged and decreed that there was then due and owing to the said Pacific Coast Pipe Company, plaintiff in said action, by the defendants Kings Hill I. & P. Co., the sum of $10,071.33, together with interest, costs and attorney's fees, and all amounting to $11,671.52, and that plaintiff in said action and cross-complainant herein have and recover of the

said Kings Hill I. & P. Co., the sum last above named, with interest until paid, and costs, and that execution issue therefor.

It was further alleged that the judgment and decree in said cause ordered, adjudged and decreed that the said sum of $11,671.52 with accrued interest, constituted a lien upon the ditch, flume, canal and right of way and all the property of the said Kings Hill I. & P. Co., described in the complaint in said action, being the same, or a part of the same, property referred to and described in the original bill of complaint of the Continental & Commercial T. & S. Bank in this action. It was further alleged in the cross-complaint that said sum of money was not paid as directed by said decree, whereupon, the Special Master appointed by the court for that purpose, after due advertisement, and on the 28th day of May, 1912, offered the said property at public sale to the highest bidder and sold the same to cross-complainant, who bid the amount of its lien; that, thereupon, upon the coming in of the report of the Special Master, said sale was, on July 9, 1912, by order of the court, duly confirmed.

Later, by leave of the court, a supplemental cross-complaint (Tr., p. 96) was filed by said Pacific Coast Pipe Company, alleging that, after the expiration of one year, the period allowed by law for redemption, no redemption having been had, the said Special Master executed to cross-complainant, a deed to the premises and that the same ever since

had been and then were the property of cross-complainant.

In its cross-complaint, defendant, Pacific Coast Pipe Company, further averred (Tr., p. 84) that, on May 1, 1908, the Kings Hill I. & P. Co. entered into a contract with the State of Idaho, whereby said company undertook and agreed with said State to construct an irrigation system or works for the purpose of irrigating and reclaiming certain arid public lands of the United States situated in the counties of Twin Falls, Owyhee and Elmore in the State of Idaho, under the provisions of the act of Congress approved August 18, 1894, commonly known as the Carey Act, and the acts amendatory thereof and the laws enacted by the State of Idaho in pursuance of the power granted by said acts of Congress. A copy of said contract is referred to and made a part of said cross-complaint and the same appears as Exhibit E in the Transcript at page 333. The cross-complaint describes the works so to be constructed, being the same as those thereinbefore in the cross-complaint described, and avers that the materials so sold and delivered by cross-complainant to said Kings Hill I. & P. Co., as thereinbefore in said cross-complaint set out, were to be used, and were actually used, in the construction and completion of the works required to be constructed and which were constructed under the terms of the contract referred to for the irrigation and reclamation of the lands referred to and described therein.

The cross-complaint then continues (Tr., p. 85):

"That said irrigation works so to be constructed and which were constructed by the said Kings Hill Irrigation & Power Company under said contract with the State of Idaho were constructed over, along, across and upon the public lands of the United States and lands of the State of Idaho and the completion of said canals and other structures, comprising the main canal and distribution system of the works so to be constructed, was essential and necessary to the securing to said Kings Hill Irrigation & Power Co. of a right of way therefor over said public lands of the United States and essential and necessary to the securing to said Kings Hill Irrigation & Power Co. of a right, title or interest in and to such right of way; and this cross-complainant avers that said Kings Hill Irrigation & Power Co. had and acquired no right, title or interest whatsoever in and to said right of way prior to the furnishing by this cross-complainant of the materials hereinbefore in this cross-complaint referred to and their actual use in the construction and completion of the canals and works referred to, being the canals, structures and irrigation works hereinbefore set out and described in this cross-complaint and in the original bill of complaint herein of the Continental & Commercial Trust & Savings Bank, as trustee."

And "says that its lien for the materials so furnished to be used and which were actually used in

the said irrigation works and system, canals, pipe lines and other structures, as set out in the cross-complaint, was and is prior and superior to the lien of the trust deed and mortgage set out in said original bill of complaint in this action." It is alleged that, besides plaintiff, the other defendants in the action claim some right, title or interest in the property, but that the same is subsequent and subject to the prior right of cross-complainant. (Tr., p. 87). The prayer of the cross-complaint is that the several other parties to the action may be required to set forth the nature and extent of their several claims and that the court adjudge and decree that the said Kings Hill I. & P. Co. was and is indebted to cross-complainant on account of the materials so furnished in the sum set out in the cross-complaint; that said sum be decreed to be a lien against the irrigation works and canal system of said Kings Hill I. & P. Co., together with the appurtenances; that it be decreed that said lien was and is prior and superior to any right, title, claim or interest had, held claim or owned by the said Continental & Commercial T. & S. Bank, as trustee, and the several other defendants, and for a decree foreclosing said lien of cross-complainant as against the said defendants and each of them.

To this cross-complaint, plaintiff, Con. & Comm. T. & S. Bank, as trustee, and several of the defendants made answer. The answer of the former put in issue the material allegations of the cross-complaint, mainly by denial for want of knowledge, but

further and specifically denied (Tr., p. 107), upon information and belief "that said Kings Hill I. & P. Co. had acquired no right, title or interest whatsoever in and to said right of way prior to the furnishing of said materials in said cross-complaint referred to and their actual use in constructing and completing the canals and works referred to, being the canals, structures, erection and works set out and described in said cross bill and in the original bill of complaint of said trustee, and denies that the lien of said cross-complainant for any materials so alleged to have been furnished to be used and so alleged to have been actually used in the said irrigation works and system, canals, pipe lines and other structures, as set out in said cross-bill, was and is prior and superior to the lien of the trust deed or mortgage set out in said original bill of complaint, but, on the contrary, avers and alleges that any lien of said cross-complainant described in said cross-bill is inferior and subsequent to the lien of said trust deed or mortgage set out in said original bill of complaint.

The plaintiff, in its answer to said cross-bill, as a further and separate defense, alleged that cross-complainant had failed to comply with the laws of Idaho relative to foreign corporations doing business in the State, but this defense was not urged at the trial and no attempt was made to show that Pacific Coast Pipe Company, in its relations with the Kings Kill I. & P. Co. was "doing business within the State of Idaho."

The transaction, out of which the lien grew, was one in interstate commerce, based on a contract made in the state of Washington, from which the materials contracted for were shipped into the State of Idaho.

As a still further defense, the plaintiff, trustee, alleged that the decree of foreclosure claimed to have been recovered by cross-complainant against the Kings Hill I. & P. Co. is void and ineffectual by reason of the fact that, at the time said action was commenced, the Glenns Ferry Canal Company, Limited, was not made a party defendant thereto or therein.

SPECIFICATIONS OF ERROR.

The specifications of error upon which appellant will rely upon this appeal are substantially as set forth in assignments of error, Nos. I, II, III, VI and IX, which assignments are as follows:

"I. The Court erred in sustaining the objection of the complainant, Continental & Commercial Trust & Savings Bank, Trustee, and of the defendant, Minneapolis Steel & Machinery Company, to the testimony offered by the defendant and cross-complainant, Pacific Coast Pipe Company, in support of the allegations of its cross-complaint." (Tr., p. 458).

"II. The Court erred in sustaining the motion of the complainant, Continental & Commercial Trust & Savings Bank, Trustee, and of defendant, Minneapolis Steel & Machinery Company, to strike out the testimony offered by the

defendant and cross-complainant, Pacific Coast Pipe Company, in support of the allegations of its cross-complaint, which testimony had been received in evidence, subject to the objection of said complainant and of said defendant, Minneapolis Steel &Machinery Company." (Tr., p. 458).

"III. The Court erred in holding and deciding that it was not necessary for the complainant to plead in answer to the cross-complaint of defendant, Pacific Coast Pipe Company; that the said Pacific Coast Pipe Company had lost its lien by reason of the failure of said Pacific Coast Pipe Company to, within six months after its claim of lien had been filed, commence an action in a proper court against said complainant, to enforce its said lien." (Tr., p. 459).

"VI. The Court erred in holding that it was necessary to the validity of the lien claimed by defendant and cross-complainant, Pacific Coast Pipe Company, set up in its cross-complaint, within six months after such claim of lien had been filed, to make the complainant, Continental & Commercial Trust & Savings Bank, as Trustee, a *subsequent* lien holder on the said premises, a party to the action brought by said Pacific Coast Pipe Company against the owner of the property in question to enforce said lien, or to commence, within said six months, an action in a proper court against said Continental & Commercial Trust & Savings Bank, as Trustee, com-

plainant herein, to enforce said lien." (Tr., p. 460). (In the transcript, the word *subsequent* was, by clerical error, made to read *prior*.)

"IX. That said decree is erroneous and unjust to defendant and cross-complainant, Pacific Coast Pipe Company, in that it decrees that the right and interest of the Pacific Coast Pipe Company sought to be asserted in this action by cross-bill is junior and inferior to the rights and interests of the complainant in and to the property covered by said lien and described in said trust deed and the amendment thereto and that the complainant is entitled to a foreclosure of its lien created by said trust deed for the payment to it of all such monies and sums as are secured thereby and is entitled to receive payment in full for all such sums before any sum from the proceeds of the sale of said property shall go to said cross-complainant, Pacific Coast Pipe Company." (Tr., p. 461).

The evidence offered in support of the cross-complaint, which was provisionally admitted by the court and later rejected and stricken out by the final decision of the court, is substantially as heretofore set out in our statement of facts. To avoid a restatement, we respectfully refer the court to that portion of our brief as containing the full substance of the evidence rejected and stricken out.

ARGUMENT.

Appellant's Priority Conceded.

It is conceded in the opinion of the trial court that the appellant's lien, as a material man, has priority over appellee's mortgage.

The trial court has dwelt so insistently upon the rights of a mortgagee, that it seems proper here to make a word of explanation by way of preface as to the equities of the appellant, who furnished over ten thousand dollars worth of material toward the creation of the property to which appellee's mortgage subsequently attached.

Appellee's trust deed dated November 2, 1908, described a canal and irrigation system not yet in existence, which was to be constructed with the money derived from the sale of the bonds under the trust deed. The very purpose of the trust deed was to finance the project and to pay for material and labor necessary to create the system. The appellant furnished materials which became a part of the system, and it was entitled to be paid out of the money derived from the proceeds of the bonds. Upon the fundamental equities of the case, therefore, the appellant's lien entitles it to protection.

Appellant's priority was established under the rule announced by the United States Supreme Court in *Bear Lake and River Water Works and Irrigation Co. v. Garland*, 164 U. S. 1, 41 L. Ed. 327, 17 Sp. Ct. Rep. 7. In that case Mr. Justice Peckham, delivering the opinion of the court, says:

"The Bear Lake Company (mortgagor) * * * never had any legal or equitable title to the land over or through which the ditch for the canal was dug as against the government until the ditch was completed. As the ditch was completed by the labor of the contractor and the very title of the mortgagor thereto was itself created by his labor, the lien attached to the property as it was created and came into being and arose coincident with the ownership of the ditch by the mortgagor and the property came into the hands of the mortgagor burdened with the lien which remains superior to that of the mortgage." (164 U. S. 19).

Judge Taft, citing the Garland case, states the rule in these words:

"Where the legal or equitable title of the mortgagor ripens and is acquired only through the outlay or expenditure of another, under such circumstances that as between the other and the mortgagor, the former has a lien in equity upon the interest of the latter, the prior mortgage with an after-acquired property clause attaches only to the interest of the mortgagor subject to the same lien."

Harris v. Youngstown Bridge Co., 33 C. C. A. 69; 90 Fed. 322, 329.

In the Garland case, the title of the mortgagor was acquired under Sec. 2339 and 2340, R. S. U. S., which make the vesting of title to a right-of-way contingent upon the completion of the canal.

In the case at bar, the title of the mortgagor, Kings Hill Irrigation and Power Company, to the right-of-way for its canal, is dependent upon the provisions of the Act of Congress commonly known as the "Carey Act," 6 Fed. Stat. Ann. 397, 398. No patent to the lands intended to be reclaimed nor any right-of-way on or over the same, nor any right, title or interest in the lands vests until the completion of the works necessary to reclaim the lands. 6 Fed. Stats. Ann. *supra.*

Evidence was introduced to show that some of the lands watered by the Kings Hill Irrigation system were lands taken up under the desert land act. These lands were not, however, described or identified and we are here only concerned with the Carey Act lands, to reclaim which was the main purpose of the contract between the federal government and the state, and the contract between the state and the mortgagor, the Kings Hill Irrigation and Power Company.

Brief Resume of Facts.

The essential facts in the case may be summarized as follows:

(a) The mechanic's lien is prior to the mortgage.

(b) The lien statute, Sec. 5118 R. C. Idaho, provides a limitation of time within which the action to enforce the lien must be brought.

(c) The action to enforce the lien was commenced within the statutory time against the owner of the legal title to the property.

(d) The mortgagee was not made a party defendant in that action.

(e) The limitation having expired, the mortgagee now brings this action to foreclose his mortgage and makes the lien holder a party defendant.

(f) The mortgagee claims that the mechanic's lien has expired as against his mortgage by virtue of the limitation contained in the lien statute, Revised Codes, Idaho, Sec. 5118.

The statutes of Idaho which are pertinent are printed in an appendix at the end of this brief.

The Issue: Is a Subsequent Mortgagee an Indispensable Party to a Lien Foreclosure Suit?

The controlling question in the case and the one upon which the trial judge based his decision is stated by him as follows:

> "The precise question * * * is, whether or not a lien claimant under the mechanic's lien law of Idaho loses his priority of lien as against a junior mortgagee, by foreclosing his lien without bringing in and making a party to such foreclosure suit the mortgagee, the period provided by the statute in which proceedings may be commenced for the enforcement of the lien, expiring during the pendency of the suit." (Tr., p. 418).

This form of the question was phrased by the court in the companion case of *Utah Implement-Vehicle Co. v. Bowman.* In order, however, to call attention to one feature of the statute not discussed

by the court in that case and more accurately to apply the question to the facts in this case, we submit that the issue before this court may be properly stated as follows:

> Whether or not a lien claimant under the Mechanic's Lien Law of Idaho, who has foreclosed his lien against the owner of the property within six months after the claim of lien had been filed (*the time not having been extended by the giving of credit*) loses his priority of lien as against a junior mortgagee by reason of his failure to make the mortgagee a party to the foreclosure suit within the six months' period.

Conflict of Authorities.

Upon the issue presented by this case, there are two lines of decision which are entirely irreconcilable. This conflict of decision is party due to a difference in the statutory provisions of the different states, but, in the main, it may be said that between the two conflicting theories, this court will have to decide which is supported by the better reasoning.

Appellee's theory, adopted by the trial court in the case at bar, is that a subsequent encumbrancer is an indispensable party defendant to a lien foreclosure suit. This conclusion is reached by a strict construction of the Mechanic's Lien Law, and where the litigation is between rival lien claimants purposely differentiates the practice from the general principles applicable to all liens.

The case most strongly relied on in support of the rule adopted by the trial court is Davis v. Bartz, 65 Wash. 395, 118 Pac. 334. Other cases in support of the same view are referred to in the decision of the court (Tr., p. 426, 427). However, the decision itself in the case at bar is perhaps the ablest presentation of the argument in favor of this view yet appearing in the reports. The reasoning in support thereof is confined strictly to the question of statutory interpretation.

Abstract of Appellant's Contention.

The other view, here contended for by appellant, we submit involves a natural and liberal construction of the Mechanic's Lien Law on the question of foreclosure, and applies to questions of priority among different lienors and the general principles of equity applicable to all liens.

A brief summary of the reasoning supporting this equitable theory may be stated as follows:

The suit to enforce the lien, having been commenced against the owner and builder within six months after the claim of lien was filed, the lien has become fixed as to time and extent and binding as an encumbrance upon the legal title.

The owner and builder is the only party against whose interest the lien can be asserted because it is that interest alone which is liable for the debt.

The only effect of making a subsequent encumbrancer a party to the lien foreclosure suit is to bar his equity of redemption, the only interest he has.

With one exception, the enforcement of the lien cannot operate to affect injuriously the interest of a subsequent encumbrancer because his sole interest in the property consists of an equity of redemption from the lien.

The exception just mentioned covers that class of cases wherein the lien is secured under such circumstances as would be fatal to it in a collateral attack upon the decree by third persons who are not parties to the record, e. g., for fraud or collusion.

The subsequent encumbrancer, if not made a party to the suit, is in no wise affected by it and may still exercise his *equity* of redemption after the *statutory* right to redeem has expired.

The subsequent encumbrancer, having taken his lien subject to the prior mechanic's lien, must redeem from such prior lien if he would now foreclose his mortgage.

The logic of this statement of the appellant's position is clearly shown in the historical development of the cases and statutes dealing with mechanic's liens.

The two earliest cases arose under statutes which provided for the enforcement of mechanic's liens by actions at law not by suits in equity. The subsequent mortgagee was there held not to be a necessary party to the action because his rights were all of an *equitable* nature and not cognizable in a court of law.

Howard v. Robinson, 59 Mass. 119;
Thompkins v. Horton, 25 N. J. Eq. 284.

In the latter case, Chancellor Runyan assigns as "the reason why the act contains no provision for notice to encumbrancers is probably that it was not intended that the proceeding to enforce a lien should be a proceeding in equity but an easy and expeditious method at law." 25 N. J. E. 290.

Of similar import was the case of State of Iowa v. Eads, 15 Iowa 114, wherein the plaintiff sought to redeem from a prior mechanic's lien and indulged the assumption that "the rules and principles applicable and peculiar to the foreclosure of mortgages equally apply to the proceedings for the enforcement of a mechanic's lien."

The Court says:

> "The analogy does not hold good. The former is a proceeding in equity, the rules of which require that, as the proceeding affects the land, all who have an interest therein and a *right to redeem from the mortgage*, such as junior mortgagees, although not indispensable, should be made parties thereto *if it be desired to cut off their equity of redemption*, which exists not only by the long established usages and rules of equity, but because, perhaps, of their being privies in estate. On the other hand, the enforcement of a mechanic's lien is a proceeding at law, *where no equity of redemption exists*, and we are not aware that it has ever been held to be necessary in such a proceeding that an encumbrancer by mortgage or other lien (except of the same kind), should be made parties thereto, while it

will be found, upon examination, that it has been held just to the reverse." (Italics ours). 25 N. J. Eq. 292.

This language was quoted with approval by Chancellor Runyan in Thompkins v. Horton, supra.

Subsequent to the case of State v. Eads, the mechanic's lien law of Iowa was revised and Section 1859 of the Revision reads:

> "In all suits under this act, the parties to the controversy shall, and all other persons interested in the matter in controversy and in the property charged with the lien may, be made parties, but such as are not made parties shall not be bound by any such proceeding."
>
> Evans v. Tripp, 35 Iowa 371.

In the Iowa cases, since the revision, the discussion proceeds upon the ground that it is important to inquire what the rights of the subsequent encumbrancer are and it is there determined that, since the mortgagee was not a proper party to this same proceeding in a court of law, his right to be heard in a court of equity is due to the fact that his estate in the property is not a *legal* but an *equitable* estate. The court then concludes that the remedy available to the mortgagee for the protection of this equitable estate is two-fold, to-wit:

First: He may redeem from the prior lien and then foreclose his mortgage.

Second: He may contest the validity of the de-

cree in the lien suit and, if successful, may then foreclose his mortgage.

Evans v. Tripp, supra.
Jones v. Hartsock, 42 Iowa 147.
Diddy v. Risser, 55 Iowa 699, 8 N. W. 665.

We will now take up these remedies separately:

1. MORTGAGEE'S RIGHT TO REDEEM FROM A PRIOR MECHANIC'S LIEN.

In those states whose decisions we have reviewed wherein the enforcement of a mechanic's lien was an action on the law side of the court, the Judges denied the analogy between an action to enforce the lien and a suit to foreclose a mortgage, but we find, in Iowa, when enforcement of mechanic's liens became a proceeding in equity, that the rules governing the foreclosure of mortgages, were adopted by the court as the rules governing the enforcement of mechanics' liens. This has been generally done by all the states wherein the enforcement of a mechanic's lien is a proceeding in equity (Idaho and Oregon Land Improvement Company v. Bradbury, (a case from Idaho,) 132 U. S. 509, 33 Law Ed. 433, 10 Supreme Court 177, Jensen v. Bumgarner, 25 Idaho 355, 137 Pac. 529,) and thus the solution of our present problem is dependent upon the theory of mortgages in force in the particular jurisdiction, the effect of which will be shown as the cases from each jurisdiction are discussed.

In Whitney v. Higgins, 10 Cal. 547, 70 Am. Dec. 748, Justice Field places a suit to enforce a me-

chanic's lien on the same basis as one to foreclose a mortgage and holds that the decrees in the two suits have exactly the same effect. He recognizes the rule that subsequent incumbrancers of the property not made parties to the foreclosure of the prior mortgage are in no wise affected and that the same is true of suits to enforce mechanic's liens. The conclusion he reaches is that the plaintiff mortgagee has the right to redeem from the mechanic's lien. In this ruling, Justice Fields holds that all subsequent incumbrancers of the property are possessed of an equity of redemption, as well as a right to redeem under the statute. In comparing the equity of redemption with the statutory right to redeem, he says that:

> "Parties obtaining interests subsequent to the plaintiff and before suit brought, who are not made parties to such suit, possess both the equitable and statutory rights. They may redeem under the statute or they may file their bill in equity."
>
> 70 Am. Dec. 753.

In the case at bar it has been sought to overthrow the force and logic of Justice Field's conclusions by reliance upon Frates v. Sears, 144 Cal. 246, 77 Pac. 905, and the importance which the trial court and counsel for appellees attach to this case justifies us, we think, in a somewhat extended consideration of this decision.

Let us test the logic of these two cases by the California theory of mortgages. That theory was first

exhaustively discussed by Justice Field in McMillan v. Richards, 9 Cal. 365, 407; 70 Am. Dec. 665, and his conclusions, approved by time and experience and applied in subsequent cases, are outlined by Prof. Pomeroy, as follows:

> "In this method of treating mortgages, the conflict between the legal and equitable conceptions is entirely removed. Partly through the adoption of equitable doctrines by the law courts and partly through the operation of statutes, the legal theory of mortgages has been abandoned but the equitable theory has been left in full force, furnishing a single and uniform collection of rules recognized and administered, so far as necessary, alike by courts of law and of equity. The mortgage is not a conveyance nor does it confer upon the mortgagee any estate *in* the land. It creates a lien *on* the land or, in the apt language already quoted, 'a potentiality to forfeit the land by proper process and condemn it for payment' of the debt. The debt is the principal fact and the mortgage is wholly incidental or collateral thereto and intended to secure its payment. The right or interest of the mortgagee from being a legal estate is changed to an equitable right enforceable by an equitable proceeding; it is for all purposes and under all circumstances a personal asset; it may be assigned and passes to the mortgagee's personal representatives on his death. * * * The mortgagee's interest being a mere lien, it is wholly destroyed and

the mortgagor's estate is left free and unencumbered by a payment of the debt secured by it at any time before the premises are actually sold under a decree of foreclosure; the estate does not then *revest* in the mortgagor, since it has never gone out of him. On the other hand, the mortgagor's interest, instead of being an equitable estate or right in equity to redeem the land from the mortgagee's ownership, is, for all purposes, under all circumstances and between all parties, the legal estate with all the incidents and qualifications of legal ownership but at the same time encumbered by or subject to the lien of the mortgage."

Pomeroy's Equity Jurisprudence 3, Ed., Vol. 3, Sec. 1188.

The application of this theory of mortgages is shown in Goodenow v. Ewer, 16 Cal. 461, where it is held that proceedings in the nature of a suit to foreclose an equity of redemption held by a subsequent encumbrancer may undoubtedly be brought by the purchaser under the decree where such encumbrancer was not made a party to the suit to enforce the mortgage. This case shows that the rights of the mortgagor are such that the enforcement of the mortgage by suit is the direct assertion of a right of action against the mortgagor, but the rights of subsequent encumbrancers may be cut off by merely closing a door which equity has theretofore held open for their benefit, in other words, by foreclosing their equity of redemption. See also Carpentier v. Bren-

ham, 40 Cal. 221, Tuolumne Redemption Co. v. Sedgwich, 15 Cal. 516.

The effect of this theory of mortgages on lien proceedings in California is shown by the following cases, which cite Whitney v. Higgins, with approval and which sustain the following remarks made in Montgomery v. Tutt, 11 Cal. 307, 315:

> "We do not think then that subsequent encumbrances are indispensable parties. If not made parties, their rights cannot be affected. They are not bound by the decree. Their equity of redemption from the purchaser continues and this they can assert at any time within the period allowed by the statutes of limitations."

Montgomery v. Tutt, supra.
Gamble v. Voll, 15 Cal. 508.
Lookout Lumber Co., v. Marion H. & B. Ry. Co., 109 N. Carolina 658, 14 S E 35.

In Frates v. Sears, the contest was between two mortgages, no mechanic's lien being involved. The first mortgage had been foreclosed by suit to which the second mortgagee was not a party and the property sold at judicial sale to the mortgagee, who afterward obtained a master's deed. After the statute of limitations had run upon the first mortgage as to the second mortgagee, the holder of the second mortgage brought his action to foreclose. The court granted him the relief he asked, the effect of the decision being to annihilate the first mortgage and all rights thereunder. This ruling is based upon the

authority of Brandenstein v. Johnson, 140 Cal. 29, 73 Pac. 744, which, in turn, cites Lord v. Morris, 18 Cal. 490.

The reasoning in this latter case is misapplied and wrongfully interpreted in Frates v. Sears, as will appear by a comparison of the two cases. In Frates v. Sears, the second mortgagee took his mortgage subject to, and with knowledge of, the first mortgage, on which the statute of limitations had not yet run. In Lord v. Morris, the purchaser from the mortgagor had purchased before the statute had run on the mortgage and before suit brought to foreclose, and the mortgagor had thereafter given a new promise. Under an early California rule, which is best discussed in McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170, the action was upon the new promise and it is evident that the mortgagor, having sold the property, was no longer in a position to renew the mortgage. For this reason, the purchaser could successfully plead the statute of limitations.

In Idaho, a rule different from that of McCormick v. Brown prevails. The Idaho rule is that the statute of limitations does not extinguish the debt but merely operates to bar the remedy, and, therefore, where a new promise is relied upon to avoid the statute, the action is still upon the original debt and the new promise merely removes the bar of the statutes as to the remedy.

Kelley v. Leachman, 3 Idaho 629, 33 Pac. 44.

In Law v. Spence, 5 Idaho 244, 48 Pac. 282, the case of Lord v. Morris is distinguished and is shown to be inapplicable to a similar state of facts in Idaho upon two grounds:

(1) "That (in the case of Lord v. Morris) the note was already barred by the statute when the new promise was made and the action was upon the new promise," and

(2) "That (in California) distinct actions lie upon the note, and mortgage and note."

5 Idaho 253.

Section 4520, Revised Codes of Idaho, provides that "there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter."

Under this section, the Idaho court holds that, so long as the debt is not barred, an action to foreclose the mortgage may be maintained.

Kelley v. Leachman and Law v. Spence were reaffirmed in Moulton v. Williams, 6 Idaho 424, 55 Pac. 1019, in which case the California rule is again distinguished from the Idaho rule. Whether or not Frates v. Sears is held to be good law, these Idaho cases throw us back upon the theory of Whitney v. Higgins, so far as Idaho is concerned and place this state in line with those decisions which follow the rule laid down by the United States Supreme Court in Ewell v. Daggs, 108 U. S. 143, 27 L. Ed. 682, 2

Supreme Court Rep. 408, the rule there announced by Mr. Justice Matthews being that a subsequent incumbrancer of real property may plead the statute of limitations to defeat the claim of a prior encumbrancer, but he must plead it *as between the parties to the debt.* This is also the rule in Kansas, as announced by Mr. Justice Brewer in Schmucker v. Sibert, 18 Kans. 104, 26 Am. St. Reps. 765, and in Nevada, as announced by this court in Hanchett v. Blair, 41 C. C. A. 76, 100 Fed. 817, wherein Judge Morrow cites, with approval, Ewell v. Daggs, supra.

The rule in Idaho, as thus pointed out, is that there is no limitation in the Idaho statutes as regards the mortgage, and, so long as the debt is not barred by the statute, an action will lie to enforce the mortgage. It may, perhaps, be argued that this rule is not applicable to a suit to enforce a mechanic's lien for the reason that, by the terms of Sec. 5118, Revised Codes of Idaho, the life of the lien is limited to a time certain unless suit be commenced to enforce such lien. However, this difference between the lien statute of Idaho and the mortgage statute of California does not produce the effect of bringing a mechanic's lien suit in Idaho within the rule announced in Frates v. Sears, but rather, it brings it within the rule of Carpentier v. Brenham, 40 Cal. 221.

In the case last cited, plaintiff was seeking to foreclose a subsequent mortgage upon real property. Prior to the commencement of the action, the prior mortgage had been foreclosed without making the

subsequent mortgagee a party. The mortgagee under the first mortgage was the purchaser at his foreclosure sale and defendants derived title from him. The defendant, Brenham, did not seek to prevent the enforcement of the subsequent mortgage but insisted that, before the plaintiff could maintain such action, he must redeem from the first mortgage; and such is the holding of the court in that case. The position of Brenham, defendant in that case, is exactly the position of the appellant in the case at bar, while the appellee here, the trustee under the mortgage, is in a position analagous to or identical with that occupied by the plaintiff in that case.

After alluding to the fact that a junior encumbrancer possesses the right to extinguish the senior encumbrance and that the enforcement of the junior encumbrance is dependent upon the extinguishment of the senior encumbrance, because it was taken upon that condition, the court says (p. 237):

> "But, if the junior mortgagee shall bring his senior into court, shall he be permitted to ignore his claims as senior mortgagee? The right then of the plaintiff as against the purchaser at the * * * foreclosure sale was a right to redeem.
>
> "A suit of foreclosure as against younger mortgagees is a suit to cut off the right of redemption and, if the plaintiff was not made a party defendant * * * in the former suit, the right to redeem was unaffected by the decree and sale under it."

The result of this is that, if a subsequent mortgagee be joined in a suit to enforce a prior mechanic's lien, the judgment therein as to him *is a decree foreclosing his equity of redemption and, in no sense, is it a judgment against his interests*, for the reason that he holds his interest subject to the prior lien and the enforcement of that lien deprives him of nothing. He still possesses the right to redeem under the statute and, upon the expiration of the time limited by the statute, his right of redemption is gone, but if, before that time expires, he desires to foreclose his mortgage, he must first redeem from the prior encumbrance and this, not because of any decree that has been rendered against him but because his right in the property is an *equity of redemption* and nothing more.

In other words, the nature of the mortgagee's action to collect his debt out of the property is determined by the nature and extent of his rights in the property.

For this reason the suit to enforce the lien, so far as the subsequent mortgagee is concerned, is merely a suit to foreclose the equity of redemption, that being the only judgment that can be had against him.

De La Vergne Refrigerating Co. v. Montgomery Brewing Co., 6 *C. C. C. A.* 272, 57 *Fed.* 111.—This is the only federal decision directly in point, so far as counsel are advised. It is a decision by the Circuit Court of Appeals of the Fifth Circuit, construing the statutes of Alabama, which in effect, are the same as those of Idaho. The question there involved was iden-

tical with the case at bar—whether a mechanic's lien shall be deemed lost unless all persons, whether mechanics or other encumbrancers, interested in the property charged with the lien, are made parties to the suit for the enforcement thereof within the time limited by the statute. The court holds that a mechanic or materialman is authorized but not required to make encumbrancers parties defendant and says:

> "If suit for the enforcement of the lien be commenced against the owner or proprietor within six months after the maturity of the indebtedness secured by it, the lien is not lost; and our opinion is that encumbrancers may, at any subsequent time, be made parties to the proceeding. The object of making them parties is to ascertain and adjust the *priorities* (emphasis is ours) in the property charged with the lien and to make the judgment in the proceeding binding on them. The effect of not making them parties is simply to exempt them from being concluded by the judgment. The statute declares, 'such as are not made parties shall not be bound by the judgment.' It seems clear to us that the effect of not making them parties is not to lose the lien."

The Court continues:

> "If these steps (for the perfection of the lien) be taken as prescribed, the lien becomes fixed as to time and extent and the amount of indebtedness for which it is security determined. These proceedings, however, do not bind any person in-

terested in the property charged with the lien, unless such person is made a party to the suit. Such person is not concluded by the judgment, which is evidence of the facts it ascertains only against parties to the record. But the lien ascertained and fixed by these proceedings is no less a lien although a priority between this and other liens or encumbrances on the property may have to be settled. The suit for the enforcement of the lien must be commenced within six months after the maturity of the indebtedness, which is a condition precedent to fixing the lien, but the settlement of the priority of liens is not limited to any such period."

Gaines v. Childers (*Ore.*), 63 *Pac.* 487.—Notwithstanding that Section 415 of the Oregon statute provides:

"Any person having a lien subsequent to the plaintiff upon the same property, or any part thereof, * * * shall be made a defendant in the case,"

the court holds

"If encumbrancers are not made parties to a suit to foreclose a lien they are, of course, in no respect bound by the decree or proceedings thereunder; but the decree itself is valid, and vests in the purchaser the legal right in a proper proceeding to compel such lien creditors to redeem."

Continuing, the court says:

"Persons holding liens upon the premises by

judgment or mortgage are not indispensable parties to such a suit (a suit to foreclose a mechanic's lien.) The only effect of not joining them with the owners of the premises is that the decree is not binding upon them and does not cut off or deprive them of the right of redemption. * * *

"The failure, therefore, to make the plaintiff (mortgagee) a party to the suit brought by Woods to foreclose his lien did not render the lien or the right acquired thereunder invalid as to the plaintiff's mortgage but the purchaser at the sale under such decree obtained the legal title to the premises subject to the right of the plaintiff to redeem."

The trial court in the case at bar did not regard this case as in point (Tr. p. 426.) It is true the conclusion of the court might have been reached without necessarily determining the question involved in this appeal, but it is evident from an examination of the opinion that this was the decisive question in the case. There is no doubt that the Oregon Court has adopted the equitable rule here contended for.

Selwood v. Gray (Ore.), 5 Pac. 196.
Koerner v. Iron Works (Ore.), 58 Pac. 863.

Monk v. Exposition Deep Water Pier Corp. (*Va.* 1910), 68 *S. E.* 280.—In this case it was held that

"Though proper parties, *in the absence of a statute requiring it*, subsequent encumbrancers

are not necessary parties in a suit to enforce a mechanic's lien."

This was a suit in equity by the appellants, who were general contractors, to subject certain property, known as the Deep Water Pier, to a mechanic's lien. The suit was admitedly brought within six months from the time when the amount covered by the lien became payable—the time prescribed by the Code of Virginia. The second lien on the property was a deed of trust. After the expiration of the six months, plaintiffs in the original bill filed an amended and supplemental bill making the trustee and holders of the bonds parties. The trial court then dismissed both the original and supplemental bills. The Supreme Court, in reversing the lower court, says (p. 280):

"The holding amounts to this, that, though a suit to enforce a mechanic's lien is brought within due time against the debtor upon whose property the lien rests, the failure to implead subsequent lienors within six months defeats the lien so far as such incumbrancers are concerned. This is plainly an erroneous construction of the mechanic's lien act. There is no statutory requirement that subsequent incumbrancers shall be made parties and, though they are *proper parties*, they are not *necessary parties* to such suit."

And again (p. 281):

"Such suit is in no sense a suit against other lien creditors of the common debtor, even when

combined as parties defendant. No relief is sought against them and, where such course is adopted, they are thus impleaded as matter of convenience to enable the court to audit liens and transfer the charge from the property to the purchase money. In this way, the court offers an unencumbered title to intending purchasers and, in the interest of all concerned, the land is sold to best advantage."

Further, on page 281:

"It is true that in some cases one creditor may set up the statute of limitations to defeat the demand of other creditors against the common debtor, but, to sustain such plea, it is essential to show that the co-creditor's debt is barred as between himself and his debtor."

This brings us to a consideration of the rules governing collateral attacks upon decrees by third persons as they have been developed in the cases dealing with mechanic's liens and also to the consideration of the second remedy mentioned on page 25, supra.

2. MORTGAGEE'S RIGHT TO CONTEST VALIDITY OF DECREE IN LIEN SUIT.

The general rule as to third persons collaterally impeaching a judgment is made up of two parts, (1) The party attacking the judgment "must show that he has rights, claims or interests which would be prejudiced or injuriously affected by the enforcement of the judgment, and which accrued prior to its rendition."

(2) "Thus situated, he may attack the judgment on the ground of want of jurisdiction or for fraud or collusion but he cannot object to it on account of mere errors or irregularities."

23 Cyc. 1068.

See also 17 Am. & Eng. Enc. of Law 849, Freeman on Judgments, 3rd edition, Sec. 335, et seq.

To bring his case within this rule, he must plead three things: (1) That he was not a party to the suit the judgment in which he seeks to attack, (2) That he has some "rights, claims or interests," specifying them, which have been injuriously affected by the judgment, (3) That the judgment was secured by fraud, collusion or something equivalent thereto, for the purpose of injuring his interests.

Howard v. Robinson, supra 22;
Hassall v. Wilcox, 130 U. S. 493; 32 L. Ed. 1001; 9 Sup. Ct. R. 590;
Cornell v. Conine-Eaton Lumber Co., 9 Colo. App. 225; 47 Pac. 912;
Schaffer v. Lohman, 34 Mo. 69.

The case of Hassall v. Wilcox, supra, deals with this question of collateral attack and was cited by appellees in the trial court because they found, in the opinion, the statement that the trustees and the bondholders were not bound by a judgment rendered in a proceeding to which they were not parties.

The case grew out of the construction of a railroad in Texas, the plaintiffs were the trustee and bond-

holders under a deed of trust given to secure money to build the road and Wilcox was a mechanic's lien claimant. Wilcox had instituted suit under the laws of Texas to enforce his lien, the hearing was before a master and some of the plaintiffs objected to the findings of the master upon several grounds, among which were the following:

> "3. That, for the purpose of defeating the lien of the mortgage, Wilcox falsely represented to the District Court that the note was for service and for amounts advanced on claims for labor performed in the construction and maintenance of the railroad. * * * That he performed no service and owned no claims which entitled him to such lien; that any lien was barred by the limitation of one year."

It also appeared that Wright had brought suit in the State Court of Texas to set aside and annul the Wilcox lien judgment on account of the acts of collusion and fraud in procuring the same. The pleadings thus bring the case squarely within the rule above set forth in regard to collateral attack and the plaintiff's right to conduct such an attack is placed by Mr. Justice Blatchford on the ground that, not having been a party to the suit to enforce the lien, he is not bound by the judgment in that suit. Being thus entitled to conduct a collateral attack upon the judgment, the success or failure of such attack must depend upon the evidence offered to prove that the judgment was procured by collusion and fraud "for the purpose of defeating the lien of the mort-

gage." The court, finding the proof in this regard too indefinite to satisfactorily determine the matter, ordered a re-examination of the claim of Wilcox "before a master on the same and further proofs if desired." The point was raised in the case that the lien was barred by the limitation of one year under Sec. 4 of the Mechanic's Lien Act of Texas, which reads as follows:

> "The lien created by this act shall cease to be operative in twelve months after the creation of the lien if no step be sooner taken to enforce it."
>
> 130 U. S. 495.

The case under discussion was commenced after the twelve months mentioned in the statute had expired, but the court entirely ignored this feature, as appellees in the case at bar are endeavoring to present it, thus indicating the objection, in the mind of the court, to be of no importance.

In Colorado, the same theory of mortgages is in force as in California and Idaho (Pomeroy's Equity Jurisprudence, 3 Ed. Vol. 3, Sec. 1188, and note beginning on page 2354) and the lien statute of Colorado is practically identical with that of Idaho, as shown by San Juan Hardware Company v. Carruthers, 7 Col. App. 413, 43 Pac. 1053.

In the case of Cornell v. Conine-Eaton Lumber Co., supra, the appellant endeavored collaterally to impeach the decree in a prior suit to enforce a mechanic's lien to which he was not a party. The court

refers to the fact that appellant had a right under the Colorado statute to intervene in that proceeding had he seen fit to do so. The opinion then continues (47 Pac. 915):

> "There is no assertion of any legal defense of appellant against the claims of the lien claimants and, having failed to avail himself of his statutory rights, he should not be heard to say that the lien judgments were not valid against the property by reason of appellees' failing to do for him what he declined to do for himself. * * * We do not undertake to determine what, if any, right of redemption appellant had or has, nor do we intend to preclude him from asserting any right he may have."

This decision was affirmed in Fleming v. Prudential Ins. Co., of Am., 19 Col. App. 126, 73 Pac. 752, in which the court holds that appellee, not having been a party to the lien proceedings, was not bound or affected by them and was, therefore, at liberty to assail the validity of the lien therein established. In referring to the Cornell case, it is said that the appellant in that case, without averring that he could have defeated the lien as a party to the proceeding in which it was declared, was denied on such showing the right to assail the lien, but that this was not a determination of any right of redemption which appellant might have nor did it preclude him from asserting any rights he might have. See also Gamble v. Voll, supra.

In Schaffer v. Lohman, supra, the court says:

> "It is true, those not made parties are not bound by the judgment, that is to say, they may impeach its regularity as was done in the case of Hauser v. Hoffman, mentioned above, but, until so impeached, it is a valid judgment. * * *."

The meaning of these cases is that a judgment once secured in a court of law is valid and binding until reversed or impeached. There are certain classes of persons who may impeach the judgment in a collateral proceeding but, to do this, the mere allegation that they were not parties to the suit is not sufficient. There are additional facts essential to a good cause of action brought for such a purpose and those facts must be pleaded and proved to entitle the party to the relief he seeks. In Hassall v. Wilcox, these facts were all pleaded and the court ordered a further examination before a master for the purpose of making the proof more definite. In the three cases discussed in this brief immediately following Hassall v. Wilcox, the pleadings themselves were insufficient to collaterally impeach a valid judgment and, in refusing the relief asked, the courts reserve to the complainant such rights of redemption as he may have.

Cases Contra Distinguished.

In Illinois, a mortgage vests the legal title in the mortgagee (Pomeroy's Equity Jurisprudence, Vol. 3, 3rd Ed., Sec. 1187, and note beginning page 2346) thus vesting in the mortgagor the equity of redemption.

The logic of the situation under this theory of mortgages is that the mortgagee must be joined in the suit to enforce the lien because in him is vested the *legal* title, (Columbia Bldg. & Loan Association v. Taylor, 24 Ill., App. 429, Lundsford v. Wren, 64 W. Va., 458, 63 S. E. 308, Seibs v. Englehardt, 78 Ala. 508) and, if he be so joined, the lien has become fixed as to time and extent and a valid encumbrance on the legal title. Then, according to the ancient usages and rules of equity, the equity of redemption of subsequent encumbrancers may be foreclosed at any time prior to the running of the statute of limitations. Sec. 28, of the Mechanic's Lien Act of Illinois, Revised Statutes of 1874, page 668, reads as follows:

> "No creditor shall be allowed to enforce the lien created under the foregoing provisions as against or to the prejudice of any other creditor or any encumbrance unless suit be instituted to enforce such lien within six months after the last payment for labor or materials shall have become due and payable."

Now, the only way that a lien may be enforced as against or to the prejudice of any other creditor or encumbrancer is by suit to foreclose the equity of redemption, and this statute of Illinois is a statute of limitations as to such a suit.

The Illinois cases, however, seem to lose sight of these fundamental principles and are it seems to us, beclouded with technical and unreasonable arguments.

In Dunphy v. Riddle, 86 Ill. 22, the court ruled that by force of the statute above quoted, at the end of six months, the lien had expired as to any other creditor or encumbrancer against whom proceedings had not been commenced, but one of the parties to that suit held as a purchaser and the lien was held to be still effective as against him. This was based on the ground that the language of the statute, "any other creditor or any encumbrance" did not embrace the purchaser. The court further stated that, although it could "perceive no good reason why a mortgagee should be thus protected, and a purchaser not be protected" still it did not feel warranted in going beyond the words of the statute. In thus failing to grasp the significance of the statute as one of limitations applied to suits to foreclose the equity of redemption, the court also lost sight of the long established rule that no man is bound by proceedings to which he was not a party. This was a suit in equity, yet the effect of the decision was that no equity of redemption existed in the hands of any of the subsequent encumbrancers. Certainly a most remarkable ruling in the face of long established principles and rules of equity and the decisions of learned chancellors. This same error is also found in the following cases:

Crowl v. Nagle, 86 Ill. 437.

McGraw v. Bayard, 96 Ill. 146.

Bennit v. Willmington Star Mining Co., of Coal City, 119 Ill. 9, 7 N. E. 498, Watson v. Gardner, 119 Ill. 312, 10 N. E.

192, Ballard v. Thompson, 40 Neb. 529, 58 N. W. 1133.

In Williams v. Chapman, 17 Ill. 423, 65 Am. Dec., 669 cited by appellees in the trial court, the mortgage was dated Nov. 25, 1844, and the "date of commencement of defendant's lien could not have been before the 29th day of May, 1845." 65 Am. Dec. 671. The lien was thus subsequent to the mortgage and the case, therefore, not in point in this discussion.

The logical result of the Illinois decisions is shown by the remarkable situation produced in two late cases which were before the court in that state at the same time. Granquist and Porter, in separate actions, had each enforced liens against the same property, both cases were appealed, and both reversed, on the ground, in each case, that the lien claimant in the other case had not been made a party. Chief Justice Cartwright, dissenting in both cases, said:

> "The anomolous situation is presented of adjudging a reversal on account of an error when the parties against whom the error was made do not desire the reversal and when no right of those parties can possibly be advanced by such adjudgment." (88 N. E. 471).

Granquist v. Western Tube Company, 240 Ill. 132, 88 N. E. 468.

Porter v. Western Tube Company, 240 Ill. 151, 88 N. E. 472.

In Indiana, the California theory of mortgages prevails, (Pomeroy's Equity Jurisprudence, Vol 3, 3rd Ed., Sec. 1188, note page 2358) and yet the same result is reached as in Illinois but on different theories. In Union Nat. Savings and Loan Association v. Helberg, 152 Ind. 139, 51 N. E. 916, the theory is that "a foreclosure (of a mechanic's lien) as against a junior mortgagee alone could hardly be said to satisfy the statutory requirement if objection were made by the property owner."

There are two faults with this reasoning. (1) A suit to "foreclose" could not, in any event, be maintained against the property owner, the holder of the *legal* title. The suit as against him is for the purpose of having his interest sold to satisfy the lien and, since he holds the legal title, he has no equity of redemption because he needs none. After sale, he has a statutory right to redeem but it is not subject to foreclosure. (2) The action as against the junior mortgagee is a *foreclosure of an equity of redemption* and such a suit against him alone cannot fasten any lien upon the legal title.

In Deming-Colburn Lumber Co. v. Union Nat. Savings and Loan Association, 151 Ind. 463, 51 N. E. 936, the theory is that since the mortgagee's rights were in no manner affected by the suit to enforce the lien to which he was not a party, his "mortgage stands just the same as it would have stood if the mechanic's lien had not been foreclosed within the time prescribed by the statute." This theory

seems, to say the least, illogical, because, before suit brought, the subsequent mortgagee has only an equity of redemption which means that he holds his claim in subordination to the prior lien and that the latter must be satisfied before he can subject the property to the payment of his claim. If the statement of the court were correct, the effect of it would be,—instead of not affecting the rights of a subsequent encumbrancer,—to actually *increase* his rights exactly as they would have been increased had the builder and owner paid the mechanic the amount of his claim and thereby discharged the prior lien. But the rights of one not a party to a suit are no more *increased* thereby than they are *diminished*, they are *unaffected*, and he is still bound, before enforcing his demand, to perform the condition upon which he acquired his right to a lien upon the property, namely the condition of redeeming from the prior lien and his equity of redemption is still preserved to enable him to perform that condition.

Diddy v. Risser, 55 Iowa 699, 8 N. W. 655.

The above remarks will also apply to the following cases:

Husted v. Nat. Home Building & Loan Association, 152 Ind. 699, 51 N. E. 1067.

Stoermer v. Peoples Savings Bank, 152 Ind. 104, 52 N. E. 606, Krotz v. A. R. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273.

Wood v. Dill, 3 Kans. App. 484, 43 Pac. 822.

In Minnesota and Missouri, it is assumed, without argument or investigation, that a suit to enforce a prior mechanic's lien is, as to a subsequent encumbrancer, a suit against some interest which he is supposed to hold *in* the property rather than a suit to cut off his equity of redemption. It is also held that the subsequent mortgagee may collaterally impeach the lien judgment by merely pleading that he was not a party to the suit. The rule, as stated in 23 Cyc. 1068, and applied in Hassall v. Wilcox, supra, and the cases discussed in this brief on pages 40 to 44 inclusive, is entirely overlooked.

Smith v. Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Reps. 661.

Falkoner v. Cochran, 68 Minn. 405, 71 N. W. 386. Russell v. Grant, 122 Mo. 161, 26 S. W. 958, 43 Am. St. Rep. 563.

Davis v. Bartz, 65 *Wash.* 395, 118 *Pac.* 334—This was the case most strongly relied upon and extensively quoted by appellee in the court below. While the opinion supports the appellee's contention it should be observed that a determination of the question which is here at issue was not necessary to a decision in that case, because the court does hold that the appellant was estopped from asserting a priority under his lien by reason of having himself first taken the mortgage and subsequently assigned the same. It was this mortgage which he was seeking to defeat and upon every consideration of equity he might have been denied relief upon this ground alone.

The decision is based on the authority of the Illinois, Indiana and Nebraska cases and it holds that "the mortgagee has something more than a mere right to redeem as against an antecedent lien. He has a right to contest its validity or assail its priority if the evidence warrants either defense." (118 Pac. 335). The rules, as laid down in regard to the collateral impeachment of judgments, are overlooked entirely and, even though the court holds that the validity of the lien may be contested or its priority assailed "*if the evidence warrants either defense*," it does not even require of the subsequent mortgagee that he should so plead as to make out a case for the collateral impeachment of a judgment by a third party, which alone would entitle him to introduce such evidence. The case of Cornell v. Conine-Eaton Lumber Company, supra, page 40, is the only authority cited in Davis v. Bartz contrary to the opinion of the court and its significance relative to the collateral impeachment of judgments was entirely overlooked, as appears from the remarks of the court as to that case. (118 Pac. 336).

We submit that the correct ruling would have been that the establishment of the lien in a suit in which the holder of the *legal* title was a party is sufficient to fasten the lien upon that title and, if the mortgagee would remove it without redeeming from the sale thereunder, he must do so by collateral attack, as was done in Hassall v. Wilcox, supra. Mere negative statements, such as this Washington case presents and such as are employed in the cases cited

therein, are not sufficient to impeach proceedings which are valid until reversed or set aside.

Howard v. Robinson, 59 Mass. 119.
Gamble v. Voll, 15 Cal. 508.

The answer to the trustee (appellee) to the cross complaint of the appellant did not plead its defense that the lien had expired by limitation under the statute. The appellant in the lower court contended that it is elementary that one relying upon a statute of limitations must plead it. The lower court, however, overruled appellant's contention (tr. p. 416). But the court's ruling is correct only upon the theory of strict construction of the lien statute adopted by him in the main opinion. If it should be held that the lower court erred upon the principal question herein discussed, then the appellant's Specification of Error No. III is also well taken.

Statutory Interpretation.

In interpreting Sec. 5118, R. C. Idaho, the effect of that clause should not be overlooked which provides that, if a credit be given, the lien may thereby be continued in force for a period not exceeding two years from the time the work is completed or credit given. This has an important bearing on the issue presented here.

The contract giving the credit would, in all cases, be a contract between the lien claimant and the *owner* of the legal title to the premises. A junior encumbrancer on the property has nothing to do with the extension of the lien occasioned by the giving

of further credit. Since he cannot prevent such extension, how can it be said that he is a necessary party to an action to enforce the lien?

The language of the statute clearly indicates the intention of the legislature that the limitation of time fixed in the statute for foreclosure relates only to the action against the owner.

CONCLUSION.

The record in the case at bar shows that appellant has established its lien upon the property here involved by suit against the holders of the legal title; that the property was sold under decree of the court; that appellant purchased at the sale; that the statutory right to redeem within one year has expired; that appellant has received a master's deed in pursuance of the sale; and that appellee was not a party to those proceedings.

It is submitted that under the law and facts of this case, the rights of the parties to this appeal are now as follows:

(1) Appellant has a valid title to the property secured upon proceedings to enforce a prior encumbrance.

(2) By reason of appellee's not being made a party to those proceedings, it is not bound by them and it might have, therefore, in this action, collaterally attacked the former decree, upon pleading and proving the necessary facts.

(3) Having failed to collaterally impeach appellant's decree, appellee must redeem from appel-

lant's prior lien as a condition precedent to the foreclosure of its trust deed or mortgage.

This completely protects the rights of appellee, as well as of appellant, for it does not require of appellee anything to which it did not agree, when it took a junior lien upon the property.

It is submitted that the decree of the lower court should be reversed and a decree entered requiring appellee to redeem from appellant's prior lien as a condition precedent to the foreclosure of its trust deed.

Respectfully submitted,

N. M. RUICK,
Solicitor for Appellant.

APPENDIX.

Sections Of Mechanic's Lien Law Of Idaho Applicable To This Case.

"Sec. 5110. Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of, any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, acqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improve-

ment or his agent; and every contractor, subcontractor, architect, builder or any person having charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter: Provided, that the lessee or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this chapter."

"Sec. 5113. The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if, at the commencement of the work or of the furnishing of the material for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired, but if such person owns less than a fee simple estate in such land, then only his interest therein is subject to such lien."

"Sec. 5114. The liens provided for in this chapter are preferred to any lien, mortgage or other incumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incum-

brance, of which the lien holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished."

"Sec. 5118. No lien provided for in this chapter binds any building, mining, claim, improvement or structure for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien; or, if a credit be given, then six months after the expiration of such credit; but no lien shall continue in force under this chapter for a longer period than two years from the time the work is completed, or credit given, unless proceedings to enforce the same shall have been commenced."

"Sec. 5124. Except as otherwise provided in this chapter, the provisions of this Code, relating to civil actions, new trials and appeals, are applicable to, and constitute the rules of practice in, the proceedings mentioned in this chapter; Provided, That the District Courts shall have jurisdiction of all actions brought under this chapter."